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Depositions in China: No Can Do



By Dan Harris on January 19, 2009

Not sure how I missed this until now, but Experience Not Logic did an excellent series of posts on taking depositions in China [links no longer exist].

The first post sets out the issue:

“ Here’s the scenario: you’re a litigator preparing a case in the United States. You have reached the onerous task of discovery. A key witness is located in the PRC. You, or your adversary, need to take the Chinese witness’s deposition. The witness is unable to come to the U.S., and their deposition must be taken in China. How do you go about taking this deposition, or preventing the other party from taking the deposition?

Though deposing a Chinese witness in China for a US court case is possible, the post goes on to say that only one such deposition has actually occurred in the last 25 years:

“ Only one limited deposition of a Chinese citizen in China has been allowed in 25+ years of China signing agreements allowing depositions to be taken. There is a very good reason for this. Depositions require the swearing of an oath. China has very strict laws regarding the administering and swearing of oaths. China likely regards the administering of oaths by foreign attorneys and consular officials as a “violation of China’s judicial sovereignty.” When foreign attorneys or consular officials administer an unauthorized oath in China, the penalties include arrest, detention, expulsion, or deportation of all participants in the oath. Even conducting a deposition in a hotel room with an oath by private persons could result in criminal penalties under Chinese law.

If you are involved in litigation and wish to take a deposition of a Chinese citizen, and you would mind having to sit in a Chinese prison, then you should probably seek permission from the Chinese authorities. If you are on the other side, and want to block the deposition of a Chinese citizen from being taken then you should raise an objection to the deposition as illegal under Chinese law, in a timely manner.

The [international dispute resolution lawyers](https://www.chinalawblog.com/2009/01/taking_depositions_in_china_it.html) at my firm has been involved in a number of cases where it has made sense to depose Chinese witnesses in China and in none of them did it ever occur. Instead, the following happened:

1. In one case, the opposing party wanted to depose five witnesses in Hong Kong. We moved to require the opposing party to at least try to secure Chinese government approval for these depositions to go forward in China. We pointed out that my firm had lawyers in China who could handle the depositions there and that flying one of them to Hong Kong to cover a deposition would greatly increase costs. The court denied our motion and the depositions went forward in Hong Kong.

2. In one case, we were representing the defendant and two China witnesses were absolutely critical to plaintiff's case. The case ended up settling before trial for nuisance value when it became clear plaintiff's two witnesses would never leave China to be deposed or to testify at trial.

3. In one case, we brought a key witness to the United States for deposition.

One possible option would be to convince a Chinese witness to be deposed within a US embassy or consulate. My firm has taken depositions overseas in US embassies, consulates, and on US military bases, but never in China. The problem with China is that the cost/risk of seeking to depose someone in China (even at a consulate or embassy) is so high that it is usually just easier to fly the witness to some other country for the deposition.

I would love to hear what others have done to depose Chinese witnesses for foreign court cases.

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